United States Court of Appeals
for the Second Circuit

APPELLEE'S BRIEF

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In the

United States Court of Appeals

For the Second Circuit.

No. 75—7344.

Ethel Beckerman and Abraham Beckerman, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

Plaintiffs-Appellants,

against

Ira Jay Sands and F. S. Management Corp.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANTS-APPELLEES.

Statement.

The plaintiffs appeal (64)* from a judgment signed by Hon. Morris E. Lasker, District Judge, dismissing the amended complaint (A106)** pursuant to a memorandum and order (A92-105), dated March 20, 1975, granting defendants' motion to dismiss the amended complaint pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure.

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*Reference to document numbers of record on appeal.

**Reference to page numbers of appendix.

At page 2 of their brief, the appellants set forth, under "Issues Presented," items "1" through "4" inclusive. Item "1" is correct. Items "2," "3" and "4" are incorrect or misleading in the following respects:

Item "2" refers to "the additional facts adduced on the various motions." As a number of motions were based on the original complaint which has been superseded by the amended complaint, any additional facts in support of the original complaint are irrelevant on this appeal.

Item 3 reads:

> "3. Was the Court below correct in dismissing the amended complaint on account of an apparent absence of the jurisdictional amount in controversy after * * *"

and then sets forth subdivisions (a), (b), (c) and (d). Subdivision (a) is as follows:

> "(a) a defendants' motion to dismiss the original complaint on that basis has been denied almost two years earlier and twice again thereafter."

The motions were denied because the Court gave the plaintiffs a further opportunity to establish punitive damages, the Court stating (A39-40):

> "Expressing no view on the merits, but taking, as we must on this motion, the allegations of the complaint as true, we cannot say that it would be impossible for the Beckermans to satisfy the requirements of the New York rule and to recover punitive damages. There is no doubt that the New York standard is an extremely high one, making it difficult indeed for plaintiffs to recover punitive damages in this state. On the

other hand, the federal standard for dismissal is also very high, and on the balance here we believe that it precludes dismissing the action.

"The motion to dismiss the non-derivative suit for lack of the jurisdictional amount must therefore be denied."

Subdivision (b) of item "3" is as follows:

> "(b) plaintiffs had been granted an interlocutory summary judgment on the issue of liability but no hearing or discovery had been had on the issue of damages."

While the Court originally granted interlocutory summary judgment, the Court subsequently granted defendants' motion for reargument, and the statement to the contrary by plaintiffs at page 4 of their brief is erroneous. The Court in granting defendants' motion for reargument stated, in its memorandum dated November 20, 1974 (A69):

> "Defendants move to reargue our Memorandum and Order dated June 28, 1974, denying their motion for summary judgment dismissing the complaint for lack of subject matter jurisdiction. * * *
>
> "* * * However, the record as more fully developed in defendants' moving papers on the present motion indicated the possible absence of jurisdiction. At oral argument on the current motion, we requested further submissions from the parties on that limited issue, in accordance with the rule that when allegations of the jurisdictional amount are challenged by the defendant, the plaintiff must support them by competent proof."

And at A70:

> "Because of the existence in the record of new factual material requested by the court, we treat

the present motion as a renewed motion by defendants for summary judgment."

And at A75:

"Accordingly, the Beckermans are directed to file an amended complaint recasting the suit as one for compensatory and punitive damages, if indeed, as plaintiffs assert, that is what it is.

* * *

"The motion for summary judgment is denied subject to the conditions set forth above."

Rule 9(m) of the General Rules of the District Court relating to a motion for reargument provides in part:

"* * * No oral argument shall be heard *unless the court grants the motion* and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court." (Italics ours.)

As the Court granted oral argument (A69) the motion for reargument was in fact granted.

Subdivision (c) of item "3" is as follows:

"(c) The amended complaint was thereafter served pursuant to a direction by the Court."

The amended complaint was served after plaintiffs accepted the Court's conditions as above quoted under subdivision "(b)" (A75).

Subdivision (d) of item "3" is as follows:

"(d) the amended complaint did not change the nature of the right being asserted?"

The original complaint contained one cause of action seeking an accounting (A4-10). The amended complaint (A77-91), alleged five counts (as more fully described at pages 6 to 9 of this brief), the first count against both defendants, the second and fifth counts against Sands, and the third and fourth counts against defendant F. S. Management Corp. The amended complaint sought over $3,000,000 (A77) while the original complaint sought an accounting for $325,000 (A4-10).

In Item "4" the plaintiffs refer to a possible right to maintain a derivative action. The amended complaint alleges strictly a class action. The plaintiffs cannot appeal from the original order dismissing the derivative action set forth in the original complaint, which has been superseded by the amended complaint. *Moore's Federal Practice,* Volume 3, 2nd Edition, ¶15.08[7], page 939. In any event, Times Square Associates, in whose behalf the derivative cause of action was commenced, since 1966 has been neither a partnership, a corporation, nor a trust, but is a trade name used by Sands individually as agent for the investors. Associates is not a party defendant in this action. A derivative action cannot be brought in behalf of an individual or an ordinary partnership. It can be brought however in behalf of a limited partnership by virtue of Section 115-a of the New York Partnership Law which was added by the laws of 1968 (c. 496, §3, effective June 5, 1968). No claim has been made by the plaintiffs that Associates is or ever was a limited partnership.

There is one other issue on this appeal, which plaintiffs neglected to mention, and that is: Whether plaintiffs are proper parties to conduct this class action.

The Amended Complaint.

The amended complaint contains five counts, is designated as a "class action" and is brought by reason of diversity of citizenship.

First Count Against Both Defendants (A77-82).

The first count alleges in substance that in "1951" (should be 1961) Sands, together with Jerome Wishner and George Gewanter organized Times Square Associates ("Associates") as a general partnership with themselves as sole partners for the purpose of acquiring a long term net lease on an office building (Par. 2); that in June, 1961, Associates became a publicly-held real estate syndicate by each of the partners selling $187,500 of participating interests in his own partnership interest to members of the public and, in connection with such sales, issued a prospectus in the form annexed as Exhibit 2, and that the three partners used the proceeds of the sales for the purposes set forth in the prospectus; that the members of the class on whose behalf the action is brought purchased their participating interests from one or another of the partners pursuant to this prospectus (Pars. 3-5); that each investor purchased his participating interest from a partner pursuant to separate written agreements similar to the one annexed to the complaint as Exhibit 1 (Par. 6); Exhibit 1 is a copy of an agreement dated June 29, 1961, between Jerome Wishner called the "Agent" and the plaintiffs called "Participants" (A11-15); that pursuant to the prospectus and the investors' agreement the premises were to be managed by Tri Management Company, a partnership comprised of the partners of Associates, at no profit to themselves (Par. 7); that in December, 1962, Tri Management ceased managing the premises and thereafter the premises were managed by First Re-

public Company, a partnership in which Sands was a partner, and thereafter by First Republic Corporation of America, in which Sands was an officer, director and controlling person (Par. 8); that in May, 1966, First Republic Corporation ceased managing the premises and defendant F. S. Management undertook the management (Par. 9); that Sands is an officer and director and said corporation is wholly owned and controlled by Sands and members of his family (Par. 10); that in May, 1966, Wishner and Gewanter resigned as partners of Associates and "defendant Sands remained as the sole general partner and agent for all investors in Associates" (Par. 11); that Sands, after resignation of Wishner and Gewanter, "was a fiduciary for all Investors" (Par. 12); that Sands in contravention of the investors agreement and the prospectus caused Associates to pay management fees, leasing commissions and administration fees to First Republic Company, First Republic Corporation and F. S. Management (Par. 18) and that Sands used a certain portion of the premises without the payment of rent (Par. 19) and caused Associates to pay legal fees and has demanded and received forwarding fees from such attorneys (Par. 20) and caused Associates to pay various personal obligations of Sands (Par. 21) and generally violated his position as a fiduciary (par. 23) and that the damages to plaintiffs and members of the class exceed $325,000 (Par. 24).

Second Count Against Sands (A82-83).

This count alleges that the fair market value of the net lease is in excess of $1,048,000; that the fair market value of other assets is in excess of $310,000; that the plaintiffs and the investors have not received distributions of $56,250 in each year "as provided for in the Prospectus and the Participation Agreement" and that

consequently each investor is entitled to receive his proportionate share of a sum in excess of $1,156,000 (Pars. 25-28).

Third Count Against F. S. Management (A83).

This is set forth in three paragraphs, as follows:

> "29. Upon information and belief, the moneys wrongfully received by F. S. Management from Associates, as alleged in the first count, were invested by F. S. Management and were used by F. S. Management to purchase assets and properties.
>
> "30. Upon information and belief, F. S. Management continued to hold the monies wrongfully received from Associates and the investments made with those monies and the assets and properties purchased with those monies in trust for the benefit of the plaintiff and the other Investors in Associates.
>
> "31. Plaintiffs do not have knowledge or information as to the amounts, if any, to which they and the other investors in Associates may be entitled under this count."

Fourth Count Against F. S. Management (A83-84).

This count alleges upon information and belief that F. S. Management received real estate management fees in excess of $113,000 and leasing commissions in excess of $25,000, from Associates; that under New York law (Real Property Law §442[e] [3]) plaintiffs and the class are entitled to punitive damages in excess of $414,000 in addition to recovering the management fees and leasing commissions.

Fifth Count Against Sands (A84-89).

This count alleges that at the time that the investors purchased their interests, Sands agreed that he would manage the premises "at actual cost and without any profit or compensation to himself except as set forth in the Prospectus and Participation Agreement" (Par. 35); that thereafter and on or about August 10, 1966, Sands sent a letter to the investors in which he reaffirmed said obligation (Par. 36); that Sands contrary to said agreement diverted more than $325,000 from Associates (Par. 37); that the plaintiff Ethel Beckerman attended a meeting to discuss the affairs of Associates on June 23, 1970, and that thereafter Sands and Associates instituted an action against the plaintiffs herein to recover damages for slander (Pars. 38-52); that the complaint in behalf of Associates charged the Beckermans with converting and removing from the premises of Associates books and records (Par. 53); that Sands also commenced a slander action against Mrs. Gussie Manheim; that said actions were brought wrongfully to impede the investors from inquiring into the affairs of Associates; that the investors are entitled to punitive damages of $1,075,000 (Pars. 58-61).

Damages in sums exceeding $3,000,000 are sought, besides an accounting (A89-90).

The defendants served their answer to the amended complaint denying in substance the material allegations and setting up various affirmative defenses consisting of lack of jurisdiction; the Statute of Limitations; that since 1961, a balance sheet and statement of income and operating expenses certified by the accountants of Associates which indicated as an expense, management and professional fees, was mailed annually to each investor and no objection was ever raised thereto by any of the investors

until about June, 1970; that the plaintiffs are estopped from claiming that the expenses charged were contrary to law; that each count fails to state a claim upon which relief can be granted, and that the plaintiffs and their attorneys do not and cannot adequately represent any class herein (50).

At the same time, defendants served affidavits and a notice of motion for summary judgment pursuant to Rule 56(b) FRCP (51), upon the ground that, as a legal certainty, the matter in controversy does not exceed $10,000, and for an order pursuant to Rule 12(b) (1) and Rule 12(h) (3) striking from the complaint all class allegations and dismissing the amended complaint and each and every count thereof upon the ground that each of said counts fails to state a claim upon which relief can be granted.

On March 20, 1975, Judge Lasker rendered a memorandum and order dismissing the amended complaint (A92-105) stating:

> "* * * Count I, which seeks compensatory damages of $325,000, contains essentially the same allegations as the entire original complaint. * * *" (A94).

And at A95:

> "Defendants argue that the claim for compensatory damages of $325,000 is clearly excessive because the damage figure includes alleged damages incurred after the commencement of this action. See affidavit of Harvey M. Sklaver, September 4, 1974. According to defendants, whose figures plaintiffs do not dispute, $101,763 of the claimed damages were incurred after the action was commenced. * * *"

And at A95-A96:

> "Adopting defendants' computations, which appear to be more than reasonable, plaintiffs are left with a claim for compensatory damages in Count I of $224,662; accordingly they must establish that they have in good faith alleged punitive damages amounting to seven times actual damages."

And at A98:

> "For the reasons stated below, the remaining counts fail to allege sufficient additional damages to make up the required jurisdictional amount."

Facts.

As the plaintiffs have set forth many erroneous facts and conclusions in their brief, we will set forth the actual facts as established by affidavits and documents.

Shortly prior to June 5, 1961, defendant Sands, Jerome Wishner and George Gewanter organized a partnership known as Times Square Associates ("Associates") as a real estate syndicate for the purpose of acquiring legal title to a leasehold of a commercial building known as 701 Seventh Avenue, New York City. After acquiring this leasehold by making a downpayment of $35,000 as a deposit, they prepared a prospectus as underwriters under the trade name of The First Republic Company, composed of the same three partners. This prospectus was filed with the New York State Attorney General's office. The prospectus indicated that the price per unit would be $5,000 and $2,500 for a one-half unit, and the total amount of the offering was $562,500. The three partners received subordinated participating units in exchange for their title to the leasehold and not for any

agreement on their part to manage the property (12) (aff. of Sands, 1/27/73, p. 11).

The prospectus, at page 7, provided as follows (A22):

> "STATUS OF PURCHASERS OF PARTICIPATIONS.
>
> "Messrs. Sands, Wishner and Gewanter, as nominees, will enter into a Participation Agreement with Investors whereby Messrs. Sands, Wishner and Gewanter will each be Agent for and represent one-third of the Participants in their equity ownership.
>
> "The Participants will own the particular Agents' one-third equity interest in the partnership in proportion to their fractional respective contributions. * * *"

The Prospectus further provides that distribution, "if available at 10% per annum payable monthly shall be made first to full Participants," and thereafter, if there is a surplus, to the agents as subordinate participants (A22). On page 1 of the Prospectus the following appears (A16):

> "The Sponsors will act as Nominees for all Participants, and will distribute to each Participant their undivided one-third interest in the entire partnership asset, consisting of the beneficial ownership of the leasehold hereinafter described. All Participants, including the Sponsors, will share proportionately in the profits or losses of Associates, said losses, if any, not being limited to capital contribution. Reference is made to caption entitled, 'Status of Purchasers of Participations.'"

The syndicate investors obtained their interests by acquiring, each under separate contract with only the one partner (of the three partners) with whom each investor

contracted, a percentage of such partner's interest in any profits and, in the event of dissolution, in the final distribution (A22) (A11). The plaintiffs in the case at bar did not enter into any written contract with the other two partners (i. e., Sands and Gewanter).

On January 29, 1961, an agreement was entered into between Jerome Wishner, one of the partners, with the plaintiffs, which provided in part as follows (A11):

> "Agreement made as of the 29th day of June, 1961, between Jerome Wishner, residing at 2046 Oliver Way, Merrick, New York, hereinafter called 'Agent' and others, hereinafter called 'Participants.'"

The agreement also provided under Paragraph 2(l) at page 3 (A13), that the agent:

> "(l) Shall receive no compensation, whatsoever, for acting in the capacity as Agent herein."

Sands, Wishner and Gewanter, as agents, were required to send financial reports to the participants, approve transfers of participation units, maintain the records of Times Square Associates, and the like. For this, they were not to be compensated. They were required to oversee the affairs of the participants as investors and to act as agents for them in that respect, *but were not required to act as uncompensated building managers* (6) (aff. Sands, 10/11/72, p. 10). Nowhere in the Participation Agreement (A11) is any provision contained that the partnership shall manage the building or make leases with tenants without compensation, or render legal services for Associates without compensation. As a matter of fact, Wishner is not an attorney (Prospectus, p. 9) (A24).

At page 5 of the Prospectus (A16) the following provision appears:

> "* * * The property will be completely operated at actual cost by Tri-Management Company, a New York Partnership, consisting of Ira Sands, Jerome Wishner and George Gewanter, under a management contract. * * * The said management contract * * * is on an at will basis * * *."

The property was in fact operated at actual cost. Outside brokers would not accept the management of this building under a condition that one of their representatives be always present during usual business hours so as to rent vacant space. Sands, at a considerable sacrifice, moved into this building so that he and his office staff could take over the management of the building and, under his supervision, could rent vacant space (30) (aff. Sands, 4/1/74, Par. 21).

Exhibit 6 annexed to the affidavit of Mr. Sklaver sworn to October 31, 1972 (9), is a balance sheet as of December 31, 1966, of Times Square Associates. Note 5 states in part:

> "NOTE 5—From January 1, 1966 through June 30, 1966, The First Republic Corporation of America managed all of the affairs of the property and the administration of the company for a fee."

The statement of income in this balance sheet indicates operating expenses for management fees, office expenses, professional fees and consulting fees (9) (Exhibit 6 to aff. Sklaver, 10/31/72).

The form and substance of plaintiffs' participation agreement were the same as commonly used by real estate syndicators in New York City in selling participating interests (30) (aff. Sands, 4/1/74, Pars. 12-15).

We have in our possession, a copy of a participation agreement dated February 28, 1958, between Alvin S. Lane designated as "Agent" and various purchasers of an interest in a long term leasehold on the Hotel Taft in New York City, designated as "Participants." Paragraph "3" thereof provides as follows:

> "3. The Agent shall act, without compensation, as agent for the joint venture in the ownership of the Property. * * *"

We also have in our possession, a copy of a financial statement covering said syndication for the period from August 1, 1972 through January 31, 1973, prepared by certified public accountants, which indicates that management fees of $22,227 and commissions of $49,427 were charged as expenses. The attorneys for the syndicators were Messrs. Wien, Lane, Klein & Purcell. Lawrence Wien, the senior member of this firm, has been regarded as the leading real estate syndicator for the last 20 years in this State (30) (aff. Sands, 4/1/74, Pars. 12-15).

The form and substance of the agreement used in the Hotel Taft syndication aforesaid was used in the preparation of plaintiffs' participation agreement. We have four similar participation agreements prepared by the law firm above mentioned in connection with other syndications, which are in form and substance similar to the Hotel Taft participation agreement. Plaintiffs' attorneys were given an opportunity to inspect all of the aforementioned agreements (31) (defendants' memo, 4/3/74, Page 23). They have not denied such facts.

We submit that the agreement annexed to the complaint is clear and unambiguous. However, even if there were any ambiguity, it is apparent that the plaintiffs construed this agreement to mean that management and professional

fees could legally be charged for the management of the leasehold building, including commissions for rentals, since they received annual reports indicating such charges for a period of about nine years and made no complaint with regard thereto (30) (aff. Sands, 4/1/74, Par. 10).

When a contract is clear in and of itself, circumstances extrinsic to the document may not be considered in interpreting the meaning of contractual terms, but when the meaning of words depends on various surrounding circumstances that are in dispute, such circumstances must be first found as a fact before interpretation can proceed. *Broadway Maintenance Corp. v. City of New York*, 241 N. Y. S. 2d 116, 19 A. D. 2d 96.

Wishner and Gewanter resigned in 1966 as partners of Associates so that Sands became the sole former partner of Associates.

F. S. Management Corp. was organized in 1967 and took over the management of the building. Sands was vice-president of the corporation which was owned and controlled by him and members of his family.

In each year, from 1962 to 1973 inclusive, the plaintiffs and all investors received by mail, a financial statement of Times Square Associates, containing a balance sheet and statement of income and operating expenses for the building, for the year ending December 31 of the preceding year, prepared by certified public accountants. Such operating expenses in each of said years set forth the management fees and the attorneys' fees as included in the operating expenses (30) (aff. Sands, 4/1/74, Par. 10). Plaintiffs first made their oral objections to these charges in 1970. They never made any written objections as they would be required to do pursuant to paragraph 12 of their agreement dated June 29, 1961 (Ex. 2 of complaint) (A14).

Plaintiffs' attorneys have submitted eight affidavits in this case, all sworn to by Mr. Sklaver, plaintiffs' counsel. No affidavit of either of the plaintiffs or of any investor has been filed in this action. Mr. Sklaver's affidavits are based almost entirely on hearsay statements allegedly made to him by third parties. The affidavits of such third parties have not been filed. In addition, Mr. Sklaver refers to testimony given by two witnesses before trial in an action commenced by the defendants against the plaintiffs in the State Court, where Mr. Sands was not given an opportunity to cross examine such witnesses and the transcript of such examination was never signed by the witnesses or filed (30) (aff. Sands, 4/1/74, Par. 4). The entire deposition was therefore void pursuant to Rules 3113 and 3116 of the New York Civil Practice Law and Rules. Rule 3113 provides for the absolute right of cross examination of witnesses. Rule 3116 provides for the right of a witness to correct the transcript of his testimony, which is then to be signed and sworn to by him and to be subsequently filed by the attorney procuring such testimony. In any case, the depositions of such witnesses do not support the various charges made by the plaintiffs.

The plaintiffs claim that they called a meeting of all the investors on June 23, 1970. In fact, no proper meeting of investors was ever called because it is established that the alleged so-called Investors Committee was not legally organized since notice of such meeting was not given to all investors, and even to less than a majority thereof (30). Defendants claim that notice of this meeting was mailed to less than a majority of the 154 investors to incorrect addresses, and not to many who had differed with Mrs. Beckerman (51) (aff. Sands, 1/11/75, pp. 10-11).

On December 16, 1970, Sands commenced an action in the Supreme Court against the plaintiffs in the within action for slander. Their answer stated:

> "At said meeting (of investors) defendants stated that they were not charging Sands with dishonesty or wrongdoing and that they wanted only to obtain meaningful facts with respect to their investment in Associates. * * *" (30) (aff. Sands, 4/1/74, Par. 1).

All charges in the case at bar made by the plaintiffs against the defendants have not only been denied, but affidavits have been submitted by Associates' certified public accountants and disinterested individuals definitely establishing that all of the reckless charges made by plaintiffs are fabrications (11, 12, 30, 51).

LAW.

POINT I.

Plaintiffs cannot aggregate their claims with the separate and distinct claims of other members of the class.

A.

To support a suit, such as we have here, not only is it necessary for the claims of the particular plaintiffs to exceed $10,000, but the claim of each member of the asserted class must do so. *Zahn v. International Paper Co.*, 469 F. 2d 1033 (2d Cir.), aff'd 414 U. S. 291.

Prior to the amendment of Rule 23 of the Federal Rules of Civil Procedure, class suits were defined as true, hybrid and spurious. The rule was changed in 1966 so that the test of a class suit was placed on a functional

basis. Prior to that change, the Supreme Court had held that in a spurious or hybrid suit, you couldn't aggregate the claims of the members of the class in order to reach the jurisdictional amount. *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 588-90 (1939). With the amendment to Rule 23, however, it was thought in some quarters that you could aggregate the claims, regardless of the nature of them, so long as the suit qualifies as some sort of a class action. But in the *Synder* case, the Supreme Court rejected this view and held that the claims of the members of a class may be aggregated only "in cases in which two or more plaintiffs unite to enforce a *single* title or right in which they have a common and undivided interest" (*Snyder v. Harris*, 394 U. S. 332 at 335). (Italics ours.) The test consequently is whether the alleged members of a class are asserting a "single" title or right which they hold in common, or are asserting separate, albeit similar claims. The latter is the situation here.

In the *Zahn* case, *supra*, the Supreme Court at pages 293-4 of 414 U. S. 291 said:

> "A classic statement of the dichotomy that developed in construing and applying these sections is found in *Troy v. G. A. Whitehead & Company*, 222 U. S. 39, 40-41 (1911):
>
> " 'When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.'
>
> "This distinction and rule that multiple plaintiffs with separate and distinct claims must each

satisfy the jurisdictional-amount requirement for suit in the federal courts were firmly rooted in prior cases * * *."

And at page 297:

"That case, *Hackner v. Guaranty Trust Co. of New York,* 117 F. 2d 95 (CA 2 1941), involved a class action brought on behalf of plaintiffs with separate and distinct claims. Judge Clark invoked a long line of authority in this Court, and in other courts, to hold that among parties related only by a common question of law and fact, 'aggregation is improper' and that jurisdiction cannot be supplied for those without claims in the requisite amount 'by adding a plaintiff who can show jurisdiction.'"

And at page 301:

"We conclude, as we must, that the Court of Appeals in the case before us accurately read and applied *Snyder v. Harris:* Each plaintiff in a Rule 23(b) (3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' 469 F. 2d at 1035."

In *Snyder v. Harris,* 394 U. S. 332 (1969), where the Supreme Court rejected the notion that aggregation was permissible in every class action under amended Rule 23, Mr. Justice Black said, at page 336:

"The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.'"

And in Moore's Federal Practice, Volume 3B, ¶23.95, at page 23-1857, it is stated:

> "If the claims are joint and common, as in the true class action, they may be aggregated. When they are separate and distinct they are not aggregable. And it makes no difference that the class action is a (b) (1), (b) (2), or (b) class suit. *It is the type of jural right that is determinative;* not the type of class suit in which the right is presented." (Italics ours.)

Aggregation was denied in *Sturgeon v. Great Lakes Steel Corp.*, 143 F. 2d 819 (6th Cir. 1944), where employees who were beneficiaries under group insurance policies procured by their employer complained that the employer had unlawfully retained dividends paid on the policies. The employees, as a class, sought an accounting and the creation of a fund out of which each would take his pro rata share. Each employee had his own contract, as do the participants in Times Square Associates, but each contract was the same and each had been issued in accord with two master policies issued to the employer. Aggregation, though, was denied becaus

> "The rights of the employees are not derived from the same or common title, but the interest of each in the dividend fund is based upon a separate and distinct contract each has with the insurer and the appellee-employer." 143 F. 2d 819, 822.

In *Troup v. McCart* 238 F. 2d 289, it was held that in a class action by policyholders claiming interests in a fund held by defendant insurer, the plaintiffs' interests were separate and distinct being derived from *individual* contracts.

In *Neville v. Delta Insurance Company,* 45 F.R.D. 345 (1968), the court did not permit plaintiffs to aggregate

their claims to attain the jurisdictional minimum. The plaintiffs formerly held contracts of insurance with the defendant. The suit was brought to recover paid but unearned premiums when the defendant cancelled plaintiffs' insurance policies. The court stated at page 349:

> "* * * The monies sought do not represent a single fund held jointly and in common by the various plaintiffs. If indeed a fund may be said to exist, it represents only a sum of a list of various amounts which parties to various contracts claim is owed them. It is no matter that the variety of debts may have grown out of a single act of defendant."

In *Givens v. W. T. Grant Company,* 457 F. 2d 612 (2nd Cir. 1972), this court refused to permit aggregation of the claims of plaintiff class. The class purported to consist of all persons who had entered into retail installment contracts with the defendant for the purchase of coupon books. Although each contract was identical except for amount, the court held at pages 613-614:

> "* * * Here each plaintiff's claim for actual damages is far short of the jurisdictional amount. Moreover it is clear that plaintiffs cannot satisfy this jurisdictional requirement by aggregating the separate and distinct claims of members of the class, the Supreme Court having held that separate and distinct claims asserted by and for numerous claimants in a class action cannot be aggregated to satisfy the jurisdictional amount requirement for diversity actions" (citing *Snyder, supra*).

B

The plaintiffs have attempted to manipulate their description of the facts in the case at bar, in order to support their claim that aggregation is permissible. They have attempted to frame the factual pattern so as to de-

scribe a common and joint fund and have characterized their complaint as seeking substantial equitable relief, when in fact no common and joint fund exists, and their claims for equitable relief are merely ancillary to their demands for compensatory damages.

Plaintiffs claim that an alleged fund exists and they describe this alleged fund to be "the total monies diverted by Sands and the assets into which these funds can be traced" (plaintiffs' brief, p. 20). According to this reasoning, all cases in which damages are sought would have funds, the funds being equivalent to the potential recoveries of the plaintiffs. The fallacy in this reasoning was recognized by the federal courts in *Neville v. Delta Insurance Co.*, 45 F.R.D. 345, 349 (1968), when, in rejecting a claim that aggregation was permissible in an action by policyholders against their insurance company to recover unearned portions of paid premiums, the court stated:

> "The monies sought do not represent a single fund held jointly and in common by the various plaintiffs. If indeed a fund may be said to exist, it represents only a sum of a list of various amounts which parties to various contracts claim is owed them. It is no matter that the variety of debts may have grown out of a single act of defendant."

The fund alleged to exist by the plaintiffs is that type of fund (if a fund can be said to exist at all in the case at bar). It is a mere amalgam of the individual and distinct claims of the various class members.

The demand by plaintiffs for equitable relief in the form of the appointment of a receiver or the dissolution of Times Square Associates is merely an attempt by plaintiffs to support their claim that the demands of all plaintiffs are common and undivided as required for aggregation under the *Snyder* decision (*Snyder v. Harris,* 394 U. S.

332). In fact, the claim for equitable relief is merely incidental and ancillary to their real demands for compensatory and punitive damages. This was recognized by Judge Lasker in his memorandum below dated November 20, 1974, wherein he stated at page 2 (A70):

> "By Memorandum of October 11, 1973, we rejected the argument; * * * that this action is essentially to compel an accounting * * *."

And at page 4 (A72):

> "* * * it is plain from plaintiffs' various submissions that this suit is brought in substance to recover compensatory damages * * * together with punitive damages, and to distribute them pro-rata to Associate's investors."

Plaintiffs have advanced two tests to be used by this Court to determine whether aggregation should be permitted in a given case. They contend that under either the "interest in distribution" test or the "essential party" test, aggregation is appropriate in the case at bar. This is incorrect. All of the cases cited by plaintiffs in support of these tests are clearly distinguishable from the facts in the present case.

In support of the "interest in distribution" tests, plaintiffs cite four cases, none of which are applicable or comparable to the case at bar. The first of said cases, *Miller v. National City Bank of New York*, 147 F. 2d 798, is an action which this Court itself has said "involved a suit which * * * sought the restoration of a *common and specific fund*" (*Ames v. Mangel Co.*, 190 F. 2d 344, 347 [2nd Cir. 1951]).* (Italics ours.) The second and fourth cases

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*The Court of Appeals characterization, in its *Ames* decision, of the *Miller* case, cited by plaintiffs, was based on the original *Miller* complaint wherein aggregation was permitted and not on the amended *Miller* complaint (as described in f.n. 3, page 16 of plaintiffs' brief) wherein aggregation was not permitted.

cited both involved common and specific funds not present in the case at bar; they were also distinguished on other grounds by Judge Lasker in his opinion below dated October 11, 1973 (A31), officially reported in 364 F. Supp. 1197 (1973) wherein he stated at page 1200, f.n. 1 (A45):

> "1. The Beckermans rely principally on *Berman v. Narragansett Racing Ass'n,* 414 F. 2d 311 (1st Cir. 1969), cert. denied, 396 U. S. 1037 (1970) * * * and *Dierks v. Thompson,* 414 F. 2d 453 (1st Cir. 1969). In both cases, the Court of Appeals made it clear that the plaintiffs did not have individual claims which they could assert, but rather that the only claims belonged to the class."

The third case cited, *Dixon v. Northwestern National Bank of Minneapolis,* 276 F. Supp. 96, *unlike* the case at bar, was not a class action. The Court permitted aggregation, *inter alia,* because plaintiffs' claims were held to be "common" and "joint" pursuant to a single instrument in the common and specific fund involved.

Thus, none of these four cases are applicable to the facts of the case at bar.

Plaintiffs' attempt to apply the "interest in distribution test" to the facts of the case at bar (plaintiffs' brief, pp. 18-19) fails, even though they have tried to frame their claims in terms of an allegedly "single transaction" (plaintiffs' brief, p. 19) so as to create a common fund where none exists. The test requires that the party opposing the class not be interested in the allocation of the recovery of the common fund to the class members. Since defendant Sands is under express contractual obligations as principal with certain investors, and as agent for others, to distribute funds received according to the participation interests of the participants as reflected on the books of

Associates, he cannot be said to be disinterested and it cannot be claimed that there is a common fund.

It should be noted that the "commentator" from whom plaintiffs have derived their two tests (plaintiffs' brief, p. 15) has himself criticized the "interest in distribution" test, stating:

> "* * * it may allow multiple claimants to obtain jurisdiction merely by framing their plea in a certain way. If the factual situation could legitimately be said to involve a specific fund then claimants could obtain federal jurisdiction by framing their plea in terms of that fund even though their individual claims were distinct and could be pressed separately. While this test was used in the early development of the Pinel doctrine, it was gradually superseded by the 'essential party' test * * *."
>
> *Note,* Aggregation of Claims in Class Actions, 68 Columbia Law Review 1559-60 (1968).

The second test advanced by plaintiffs, the "essential party" test, requires that the class members be so united in interest that no class member could bring suit without directly affecting the rights of the members of the class. The two cases cited by plaintiffs in support of this test, *Brandt v. Owens Illinois, Inc.,* 62 F.R.D. 160, and *Bass v. Rockefeller,* 331 F. Supp. 945, are clearly distinguishable from the case at bar. These two cases, unlike the present action, contain fact patterns which involved specific and common existing funds which the plaintiffs therein sought to equitably affect for the benefit of all class members. In its decision approving aggregation in the *Bass* case, *supra,* that Court stated at page 951 (of 331 F. Supp.):

> "* * * the plaintiffs herein make no specific claims for individual payment, and it is seriously doubted if they could; the *absence of contractual rights be-*

tween the parties is a significant factual similarity between the present suit and the one in Berman." (Italics ours.)

The *Berman* and *Bass* cases, *supra,* which permitted aggregation, are heavily relied on by plaintiffs despite the fact that the class members in the case at bar have express contractual rights deriving from individually executed written contracts, which is not the fact in the *Berman* and *Bass* cases. This distinction was observed by Judge Lasker in his memorandum dated November 20, 1974, where he stated at page 4 (A72):

> "Each plaintiff has separate rights deriving from his separate contract with defendants, and by its terms each contract here provides an individual right to sue the syndicate management."

The two reasons plaintiffs cite (plaintiffs' brief, pp. 19-20) for denominating the case at bar as a true class action permitting aggregation are inapposite. As to the first reason, admittedly once it is determined that Sands breached his fiduciary duty, all the investors will be affected—but not similarly. Each would be affected depending upon his specific contract right. In any case, whenever there is a class action, be it under FRCP 23(b)(1), (b)(2) or (b)(3), there will be common questions of law and fact involved, and the determination of such questions will affect class members similarly. This does not mean, however, that aggregation will be permitted in all such situations. Aggregation depends on the type of jural right being asserted, and not the type of suit or manner in which it is presented. Moore's Federal Practice, 2d Edition, Volume 3B at page 23-1857. This also answers plaintiffs' second reason—since plaintiffs' attempt to cast their complaint in an "equitable" mold based on an allegedly common and joint fund does not mask the fact that what is actually and primarily sought is compen-

satory damages for alleged breachs of contracts (memorandum of Lasker, D. J., dated November 20, 1974, pp. 4, 7) (A72, 75). Plaintiffs' alleged "fund" is that which was described in *Neville v. Delta Insurance Co.,* 45 F.R.D. 345, 349, *supra,* as "* * * the sum of a list of various amounts which parties to various contracts claim is owed them." There, aggregation was denied, the Court holding that "The monies sought do not represent a single fund held jointly and in common by the various plaintiffs" (p. 349).

Since in the case at bar, there is no common and specific fund which plaintiffs seek to affect, and there exists individual contract rights among the class members and the [illegible] of the individual class members are distinct and could be litigated separately, this case is not appropriate for aggregation.

POINT II.

The claim for damages, especially those claimed to be in excess of $326,000. is not made in good faith and is sham and fraudulent.

In previous motions in this case, Mr. Sklaver, attorney for plaintiffs, filed two affidavits verified respectively September 4, 1974 (42), and April 10, 1974 (32). The September 4, 1974 affidavit, at pages 2-3 states:

> "From the financial reports and other facts which I learned I estimate the actual damages to be in excess of $326,000 as follows:

Management fees	1967-1972—known	$ 90,881
	1973-1974—estimated since the 1973 report has not yet been sent to investors	48,000

Leasing commissions 1967-1972—known			27,342
1973-1974—estimated			8,000
Administration charges 1966-1972—known			34,459
1973-1974—estimated			12,000
Legal fees—known		$5,650	
Estimated—shown on			
1970 statement		$26,379	
1971 statement		25,121	
1972 statement		22,073	
		$73,573	
Properly chargeable to Associates based upon prior financial statements $12,000 per year		$36,000	
Not properly chargeable			37,573
Rental value of space—approximately 3,000 square feet at $4.50 per foot $13,500.			
Value of the space for 8-1/2 years—$114,750.			
Average use from one room in 1966 to the entire ninth floor at present -50%			62,500
total:			$326,405"

Copies of the financial reports referred to were annexed as exhibits to Mr. Sklaver's affidavit of April 10, 1974, being therein designated as "Annual Reports of Times Square Associates for the years 1967 through 1972" (Tabs 1967, 1968, 1969, 1970, 1971, 1972) (32).

We have submitted an affidavit of David J. Bell, C.P.A. (51), senior partner of the accounting firm of Cogan Bell & Company, independent auditors for Associates since

1969, wherein his detailed analysis clearly establishes that the claim for $326,405 is largely exaggerated and lacking in good faith.

From the figures quoted at pages 2 and 3 of Mr. Sklaver's affidavit, *supra* (42), it is clear that the $326,405 damages alleged therein included alleged damages for periods *after* July 22, 1972, when this action was commenced. Assuming for purposes of argument that Mr. Sklaver's figures are accurate, the alleged damages for periods after July 22, 1972, as set forth therein are as follows:

Management fees—as above set forth	$ 12,122
Management fees—estimated 1973-1974	48,000
Leasing commissions—½ of commissions of $3911—reported for year ended December 31, 1972	1,955
1973-1974—estimate by plaintiffs	8,000
Administration charges—1/2 of charge of $6,000 for year ended December 31, 1972	3,000
1973-1974 estimated administration charges	12,000
Legal fees—known (not reported in any financial statements annexed to plaintiffs' affidavits)	5,650
Legal fees 1972—½ of $22,073 reported in December 31, 1972 financial report	11,036
	$101,763

Even for this purpose we have, *arguendo,* given him the benefit of items which we have previously and again shown by uncontroverted affidavits to be simply unsupported "guess" work on the part of Mr. Sklaver. He does not claim to be an expert on rental values and he does not even claim he ever visited the building. His guesses as to inflated rental value certainly are not *bona fide* to support a jurisdictional amount.

Almost the entire case is made up of the suspicions of Mr. Sklaver, whose record of "guesses" in this case has proven very poor.

In *Friedman v. Meyers,* 482 F. 2d 435 (2d Cir. 1973), the court per Judge Mansfield, said at page 439:

> "* * * Suspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred. * * *"

Thus from the alleged damage sum of $326,405 above referred to, $101,763 must be deducted, as having been allegedly incurred after the commencement of the action, leaving a balance of $224,662. Even if plaintiffs could theoretically recover this entire compensatory amount, the alleged punitive damages, in order to give the Court jurisdiction, must be at least *seven times* that amount, which is unheard of.

In an action for damages against an agent for his failure to exercise proper care in the leasing and management of the plaintiff's property, the court held that the plaintiff was not entitled to punitive damages. *Wright v. Everett,* 90 S. E. 2d 855, 197 Va. 608 (1956).

Furthermore, in his computation of the $326,405 alleged damages as set forth in his September 4, 1974 affidavit quoted above, plaintiffs' attorney, in referring to the financial reports of Associates, stated that "legal fees" were shown in the 1971 statement in the amount of $25,121. However, an examination of the 1971 financial statement annexed to Mr. Sklaver's April 10, 1974 affidavit (32), will show that Exhibit C to the 1971 financial statement entitled "Statement of Income & Expense for the year ending 12/31/71" shows "Professional fees" amounting to $25,121. "Professional fees" are not synon-

ymous with "legal fees," as plaintiffs' attorney would have the Court believe. Mr. Bell's affidavit, previously referred to, which was never contradicted by plaintiffs, states that included in the $25,121 figure are accountants' fees of $6,921; he further states that of this $25,121 figure, only $2,075 was paid to Sands (51) (aff. Bell, 1/11/75, par. 14).

Even, *arguendo*, were the Court to determine that Sands may not be compensated for real estate and professional services heretofore rendered, the controlling principle of law requires Times Square Associates to at least reimburse Sands and F.S. Management for expenses incurred to benefit Times Square Associates (see Point Three of defendants' brief, dated July 12, 1974, pp. 37-41) (38).

It is *a legal certainty* that plaintiffs' claims are really less than the jurisdictional amount. Furthermore, Mr. Sklaver has the burden of proof of establishing by competent evidence that the District Court had jurisdiction. *McNutt v. General Motors Acceptance*, 298 U. S. 178, 189 (1936).

Judge Lasker in his memorandum and order dated March 20, 1975, dismissing the complaint said (A95-96):

> "Adopting defendants' computations, which appear to be more than reasonable, plaintiffs are left with a claim for compensatory damages in Count I of $224,662; accordingly they must establish that they have in good faith alleged punitive damages amounting to seven times actual damages."

and definitely held that plaintiffs' claim was considerably less than $10,000 (A98).

POINT III.

Plaintiffs in a diversity action cannot plead or prove damages, allegedly incurred, for periods after the action was commenced, in order to establish the required jurisdictional amount of $10,000.

Once an action has been commenced, plaintiffs cannot prove that they *thereafter* sustained additional damage or loss by reason of actions of defendants. A plaintiff, who has the burden of proof, must stand or fall upon his ability to establish that damages of at least $10,000 for each plaintiff and for each member of a class are sought in *good faith.* He cannot establish the jurisdictional amount by later proving additional losses or damages sustained *after* commencement of his action in order to prevent dismissal of his action for lack of jurisdictional damages. In the case at bar, the Court never had jurisdiction when this action was commenced on July 22, 1972, because it is a legal certainty that plaintiffs could not establish the necessary jurisdictional amount of damages. Such defect cannot be cured by proving *subsequent* damages, possibly incurred after the commencement of the action. A party cannot enlarge the period when the statute of limitation takes effect, by prematurely starting a federal action without requisite damages.

In *Wiesenfeld v. Secretary,* 367 F. Supp. 981, 985 (D. N. J. 1973), the Court said:

> "* * * The amount in controversy is measured as of the time when the action was filed. *Smith v. Maryland Casualty Co.,* 292 F. Supp. 358, 359 (E. D. La. 1968)."

Future installments could *not* be considered in determining whether the jurisdictional amount was involved,

even though judgment would be determinative of liability for future installments as they accrued and for installments which became due after action commenced. *Aetna Casualty & Surety Co. v. Flowers,* 330 U. S. 464 (1947); *Milan v. Kausch,* 194 F. 2d 263 (6th Cir. 1952).

In an action to recover payments already accrued under a contract providing for installments where liability for payment was denied, the court could not also consider in determining the amount in controversy money due in the future when liability under the contract was established. *Button v. Mutual Life Ins. Co.,* 48 F. Supp. 168 (D. C. Ky. 1943).

POINT IV.

The investors were never partners of Times Square Associates.

This clearly appears from Exhibits 1 and 2 annexed to the complaint (A11 and A16). Exhibit 2 is the prospectus of Times Square Associates. Exhibit 1 is the agreement dated June 29, 1961, between Jerome Wishner, designated as "Agent" and the plaintiffs, designated as "Participants."

The Prospectus.

Page 1 of the Prospectus states that the approximate date of the first sale to the public is June 5, 1961. This is $3\frac{1}{2}$ weeks prior to the date of the aforesaid agreement. It also states "This offering is limited to adult residents of the State of New York."

At page 5 of the Prospectus, it is stated:

> "Times Square Associates (herein called Associates) is a New York General Partnership composed of Ira Sands, Jerome Wishner and George Gewanter, as General Partners and Sponsors, with offices at 375 Fifth Avenue, New York City.
>
> * * *
>
> * * * The property will be completely operated at actual cost by Tri-Management Company, a New York Partnership, consisting of Ira Sands, Jerome Wishner and George Gewanter, under a management contract. * * * The said management contract is non-assignable and is on an at will basis, and may be cancelled at the option of either Associates or Tri-Management Company, with no liability enuring to either party."

At page 6, under subdivisions "a" to "g" inclusive, each investor is referred to as a "Participant."

At page 8 under subdivision (h) it is stated:

> "A Participant may transfer his interest to any individual of full age, provided the consent of the Agent is obtained, same not to be unreasonably withheld. * * *"

The Agreement of June 29, 1961.

The second "Whereas" clause provides:

> "Times Square Associates is a New York Partnership, consisting of Ira Sands, Jerome Wishner and George Gewanter, hereinafter called 'Associates.'"

Paragraph "1" provides:

> "1. A Partnership known as Times Square Associates has been formed for the purpose of owning the leasehold to the premises situated at 701-09 Seventh Avenue,"

and further states that distribution at 10% per annum shall be made first to Full Participants (who are the investors).

At pages 2 and 3, under subdivisions (a) to (l), all the investors are referred to as Participants, and not as partners.

At page 3, paragraph 4, the following appears:

> "* * * The surviving Agents, however, on behalf of all the Participants, shall have the right, not the obligation, to form a new Partnership, to engage in the same business as this Partnership and apply the assets and name to the Partnership. * * * The surviving Agents shall have the right to do all such things or cause all such things to be done, as shall be necessary or advisable for the formation of the new Partnership and the accomplishment of the foregoing, and shall thereupon act as Agent on behalf of all the Participants. Any Participant not desiring to be included, may so indicate and request the Agent or his designee, to proportionately purchase his interest, at original cost, less any capital previously repaid thereon."

The Agents referred to are Sands, Gewanter and Wishner.

At page 4, paragraph 6, it is stated:

> "A Participant may transfer his entire participation to any individual of full age, provided the written consent of the Agent is obtained, same not to be unreasonably withheld. * * *"

And in paragraph 7:

> "Upon the death of a Participant, any individual of full age designated in the decedent's will, or by his legal representative, may succeed to his interest, provided the consent of the Agent is obtained, same not to be unreasonably withheld. * * *"

Associates acquired a 21-year lease of the commercial building (p. 5 of Prospectus). The partnership of Associates, composed of Sands, Gewanter and Wishner, was to continue during this period. The agreement signed by the plaintiffs as investors was for the same period. It was not signed by the other two partners. Consequently the 150 investors could not legally be partners of Associates. *Piner v. Leder,* 188 N. Y. S. 818 (115 Misc. 512) (aff'd 192 N. Y. S. 946). Furthermore, under Section 20 of the Partnership Law, every partner is an agent of the partnership for the purposes of its business. The Prospectus and agreement aforesaid clearly indicate that the investors are not authorized to act as agents or partners of Associates.

The prosposition that a partner may sell an interest in his share of the partnership without the assignee becoming a partner was upheld in *Leon v. Glaser,* 28 A. D. 2d 833, 281 N. Y. S. 2d 441 (1st Dep't 1967). Also, Section 53 (1) of the Partnership Law of New York provides:

> "1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitled the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs or to require any information or account of partnership transac-

tions, or to inspect the partnership books; *but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.*" (Italics ours.)

Even in a case where it appeared that a party shared in the profits and losses of a firm, it was found and decided that no partnership existed, it appearing that the party had denied the partnership under oath and that he did not intend to become a partner. *Heye v. Tilford* (1896), 2 App. Div. 346, 37 N. Y. S. 751, affirmed 154 N. Y. 757, 49 N. E. 1098.

Although a certificate reflecting the resignations of Wishner and Gewanter was filed with the County Clerk of New York County, no certificate was ever filed setting forth the name of any participant as a partner (as would have been required by §130 of the New York General Business Law had such participant been a partner). The failure to file such a certificate is an indication that no such partnership existed, and that none was intended.

Plaintiffs suggest that Judge Lasker "recognized that Associates is a partnership" (p. 21 of plaintiff's brief). This is a misstatement not supported by the facts. In his memorandum dated October 11, 1973 (A31), Judge Lasker clearly rejected the plaintiffs' argument that Associates was a partnership consisting of Sands and the investors therein, by stating at page 4 (A35) thereof:

> "The agreement which is in question here (Complaint, exhibit 2) is that entered into between the partners and the participants, including the Beckermans. It should at this point be noted that each participant entered into a separate agreement with one of the partners, all of the agreements be-

> ing identical. A careful perusal of these agreements leads us to conclude that a partnership was not and could not have been created by them."

In his memorandum dated November 20, 1974 (A68), Judge Lasker stated (A70):

> "* * * By memorandum of October 11, 1973, we rejected the argument that Associates is a partnership; * * *."

Finally in his memorandum granting defendants' motion to dismiss the amended complaint dated March 20, 1975 (A92), Judge Lasker states (A93):

> "This suit by *investors* in Times Square Associates, *a real estate syndicate*, for breach of trust by its *general agent* * * *." (Italics ours.)

Clearly therefore, Judge Lasker recognized that the separate and distinct participation agreements, individually executed by the 154 investors over a period of several months, could not and did not constitute a partnership contract.

POINT V.

The plaintiffs are not proper parties to conduct this class action.

Paragraph 17 of the amended complaint (A80) provides as follows:

> "17. Upon information and belief:
>
> "a) The plaintiffs have no individual interest in controlling the prosecution of the action;

"b) This is the only action pending which embraces the claims contained herein;

"c) It is desirable that the action be maintained in this Court which is convenient to all parties and witnesses; and

"d) There are no difficulties likely to be encountered in the management of this action."

The plaintiff Ethel Beckerman has been charged with attempts to bribe the superintendent of the building and former employees of Associates, in an attempt to take over the management of the building (aff. Al Fiore 4/1/74 (30); Joan Stuhl, 4/1/74 (30), and Jerry Brunell, 4/1/74 (30)). No affidavit has been served or filed by plaintiff Ethel Beckerman denying such charges against her or denying the claim that the suit in the District Court was brought in retaliation for the suit brought by Sands and Times Square Associates against the plaintiffs herein in the State Court (aff. Sands, 4/1/74, par. 8) (30).

The plaintiffs have a selfish interest in bringing this class action primarily for their own personal benefit. They are legally disqualified, as they cannot fairly and adequately protect the interest of the class.

See:

Maynard, Merel & Company v. Carcioppolo, 51 F.R.D. 273 (SDNY 1970);
Lynch v. The Sperry Rand Corporation, 62 F.R.D. 78, 82-84 (SDNY 1973);
duPont v. Wyle, 61 F.R.D. 615, 621 (D.C.Del. 1973).

In the *duPont* case, *supra,* the Court stated:

> "The requirement that 'the representative parties will fairly and adequately protect the interest of the class' plays a crucial role in the class action scheme of amended Rule 23. Since that scheme holds the potential of binding class members who have no actual knowledge of the suit, the requirements of due process, as well as the necessity for confidence in the judicial process, demands assurance that representative parties can be counted upon to faithfully defend the interests of all members of the class. Subdivision (a)(4) of Rule 23 was designed to provide that assurance."

The attorneys for the plaintiffs in this action, after their amended complaint in the case at bar was dismissed, started a similar suit in the Supreme Court, New York County, in behalf of Bernard Brown, who is one of the investors in the syndicate and who resides in the State of New York, against Ira J. Sands and F. S. Management Corp. On July 7, 1975, the undersigned served a notice of appearance in behalf of the defendants in that action.

The practice of commencing the same law suit in the Federal Court and in the State Court has been "unreservedly" condemned. *Rosenfeld v. Black,* 445 F. 2d 1337, 1341, footnote 5 (2nd Cir. 1971) (appeal dismissed 409 U. S. 802). In that case this Court stated:

> "* * * a litigant is entitled to his day in one court, but not in two * * *."

The case at bar should have been brought in the State Court, but plaintiffs did not desire to do so since, as non-residents, they would have been required to file an undertaking in the minimum sum of $500 to cover costs

(Section 8503, as amended July 1, 1972, New York Civil Practice Law and Rules).

It is the policy of Congress to force litigants, citizens of different states, to settle their disputes in state courts unless facts appear in the record showing to a legal certainty that the requisite jurisdictional amount is involved. See, *Sturgeon v. Great Lakes Steel,* 143 F. 2d 819 (6th Cir. 1944); *Fletcher v. Gerlach,* 7 F.R.D. 616 (S.D.N.Y. 1947).

A federal court is *presumed to be without jurisdiction* until the contrary is affirmatively made to clearly appear; *Young v. Main,* 72 F. 2d 640 (8th Cir. 1934); *Le-Mieux, Inc., v. Tremont Lumber Co., Ltd.,* 52 F. Supp. 116 (1943), aff'd 140 F. 2d 387 (5th Cir. 1944).

Federal courts should not be required "to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2nd Sess. 3-4 (1958). Also, H. R. Rep. No. 1706, 85th Cong., 2nd Sess. 3 (1958).

CONCLUSION.

The judgment appealed from should be affirmed with costs.

Respectfully submitted,

WEINSTEIN & LEVINSON,
Attorneys for Defendants-Appellees.

Frank Weinstein,
Samuel Weinstein,
Of Counsel.

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Sklarew
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C Spitz
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